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In the Supreme Court of the United States

October Term, 1959

JOHN C. WEBB AND HELEN H. WEBB, Petitioners

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN C. WEBB

JOHN C. WEBB
HELEN H. WEBB
Petitioners
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v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

John C. Webb, on behalf of the petitioners, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals, for the Fourth Circuit, issued January 18, 1960, denying an appeal from the United States District Court for the Maryland District, at Baltimore.

OPINIONS BELOW

The opinions of the courts below are Appendix A, infra, pp. 18 and Appendix B, infra, pp. 20-29. The former is titled John C. Webb and Helen H. Webb, appellants, v. United States of America, appellee, No. 7999, and the latter is reported as United States of America v. 72.71 acres, more or less, Civil No. 8628, 23 FRD 635-640. The Inquisition and Judgment of the trial are dated and entered October 24, 1957, in the District Court for the District of Maryland (App. C, pp. 30).

JURISDICTION

The jurisdiction of this court is invoked under

1. Amendment V to the Constitution for the United States of America.

2. By reason of its supervisory jurisdiction over the proceedings of Federal Courts, and the exercise of such jurisdiction through seeing that the waters of justice are not polluted.

USCA Title 28, Section 1254, Note 2.

The judgment sought to be reviewed is dated and entered January 18 1960, in the United States Court of Appeals for the Fourth Circuit (App. A, infra, pp. 18).

On April 14, 1960, an order extending the time to file this petition for writ of certiorari by 30 days to and including May 17th, 1960, was signed by Mr. Chief Justice Warren.

On May 17, 1960, an order extending time to file this writ of certiorari by 30 days to and including June 16, 1960, was signed by Mr. Chief Justice Warren.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below erred in affirming the order of the United States District Court, for the District of Maryland, which failed

   a. to show comprehension and treat in any way on the impact of evidence, newly-discovered as to availability, which establishes the purchasers of Hadley farm (prior to the U. S. taking of Webb land) as being highly competent in general business matters and in greater Washington real estate matters in particular;

   b. to rationalize clearly on why, in the light of (a), above, the purchase price of $700 an acre actually paid by Custards, Inc., for Hadley Farm, next to the Webb farm, and prior to the U. S. Land taking, would not produce a more favorable valuation for the Webbs at a new trial;

   c. to use facts in a manner that would invalidate the conclusion reached that the Webbs filed too late;

d. to recognize that the charge of fraud was, indeed, fraud against the court, for which there is no time limit for filing;

e. to recognize that the Webbs were deprived of adequate trial counsel through excessive fear of the judge who committed reversible error when the court refused permission for the Webbs' expert witnesses to introduce documentary evidence to support their appraised values, and, were likewise prevented from giving the theories on which their appraisals were made;

f. to consider that the failure of the Webb appeals lawyers to appeal upon the basis of (e) above may well have stemmed from professional courtesy to the trial lawyer to the harm of the Webbs.

Constitutional provisions and Statutes involved.

The Constitutional provisions and statute which the case involves follow:

Amendment V. "No person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

USCA Vol 28, See 1254. Rule 60(b) FRCP (App. B, infra, pp. 28 and 29).

STATEMENT OF THE CASE

This case results from a second appeal for a new trial, this time from a denial for a motion and an amended motion for relief from final judgment under Rule 60(b), FRCP. The United States instituted the suit on December 5, 1955, by filing a condemnation complaint and a declaration of taking to obtain land for use as a NIKE launching site. In October, 1957, following pre-trial, a jury determined the

amount of just compensation due the appellants for the land taken from them to be $14,000 and, the district court entered judgment for this amount on October 24, 1957. Immediately thereafter and with new counsel, petitioners moved for new trial on the grounds of (1) improper mingling of the jury and government counsel and (2) improper injection of the price paid for the farm by the Webbs into the trial by the plaintiff. The trial court, Chesnut, J., denied this motion (157 F Sup 401); and his decision was affirmed by the U. S. Court of Appeals, Fourth Circuit, on June 30, 1958, (265 F 2nd 669). On January 12, 1959, this court denied certiorari for petitioners (358 U.S. 931).

Meantime the trial counsel and the appeals lawyers for petitioners moved the trial court, in concert, to impress a lien for attorneys' fees against the judgment. The Webbs, in proper person in all actions thereafter, protested the liens on the basis that they had not received professionally competent services from the trial lawyer nor from the appeals lawyers. (R pp 33, 41, 50, 51, 54) The Webbs invited the trial judge to take jurisdiction and recited various lapses in professional competance, resulting in the failure of the jury to hear available Webb evidence. The court was informed of the inhibiting and excessive fear entertained for the trial judge by trial counsel. The Webbs offered to accept and to pay whatever Judge Chesnut determined that they owed of the amounts claimed. The motions for liens were denied on October 31, 1958 (167 F Sup 312).

The trial lawyer and the appeals lawyers, retaining the same lawyer, and again moving in concert in common cause, instituted litigation for their fees in the 6th Circuit Court of Maryland for Montgomery County. Motions for summary judgments were denied and trials were docketed for March 30, 1960, No. 8405 Law and March 31, 1960, No. 8406 Law. The trial lawyer had his case temporarily removed from the docket. The appeals lawyers case was

settled before the judge with trial for negligence to be instituted later.

On October 10, 1958, and as an outgrowth of the defense against the impressment of liens, the petitioners filed their original motion for relief from final judgment under Rule 60(b) on the basis of newly discovered evidence. (R pp 24-29). Judge Chesnut declined to hear arguments until this court had ruled on the petition for certiorari and the U. S. Court of Appeals had granted him leave to hear it. (R pp 30-31). The Court of Appeals so granted on March 11, 1959 (264 F 2d 888).

On April 7, 1959, petitioners moved to amend their motion for relief from final judgment on the basis of newly discovered evidence by adding additional grounds (R pp. 32-36). Thus the petitioners set forth (a) newly discovered evidence—Hadley farm next door had really been purchased before the land taking by a syndicate of 10 competent business men possessing competence in Washington real estate matters as well. Their identity would establish the real value of their purchase and the corresponding value of the Webb property to a new jury as no expert witness could. They had purchased the 388 acre farm at $700 an acre. The government had appraisals of the Webb property at about $180 an acre. All this evidence had been denied the Webbs at the trial by the syndicate, Custards, Inc. (C. Leo De Orsey, Pres. and A. Jasper Moore, syndicate mgr.). The present availability of this information was assured by the discovery in September, 1958, of a straw sale from Custards, Inc. to Catherine E. Wahler, recorded on April 1, 1957. This straw sale assures the existence of records that can be subpoenaed. The Webbs had prepared for scheduled trial date on March 27, 1957. Preparation included the examination of land records then existing. The trial date was postponed by the Government. Between then and trial date on October 22, 1957, the Webbs established and maintained contact with A. Jasper Moore who gave

freely the information now available as evidence as above noted. He gave no indication of a change of ownership from Custards, Inc.

(b) Relief was sought on the basis of fraud. The first incident of fraud was discovered after the trial in that a government appraiser and expert witness who testified that the Webb land was worth only about $180 an acre for a NIKE site of about 39 acres had previously appraised for the government a 71/2 acre tract on Hadley farm, next to the Webbs, as being worth $1,000 an acre for housing. The second incident was where government counsel in closing had termed repeatedly that Snouffer School Road, on which the Webb farm fronts, was merely a dirt road. He knew this to be short of the truth and that the road had been approved for permanent improvement as an arterial road for which funds were appropriated within several months after the U. S. taking.

(c) Relief was sought on the basis of clause (6), "any other reason," specifying (i) the monstrocity of the award (R pp 33, 52, 68) and (ii) the restrictive effect of the legal system (R pp 21, 41, 53, 54) that deprived the petitioners from timely discovery of competent trial and appeals counsel and, after the discovery of this type of competence, deprived them of such services through the operation of "professional courtesy" — the extreme unwillingness of law school staffs and lawyers to act in cases where possible negligence of other lawyers is an issue and of judges to entertain propositions or evidence in such cases.

i. As to monstrocity of the award, neighbors of the Webbs all received prices or appraisals greatly in excess of the Webbs award per acre. Hadley farm, next in one direction, was appraised for the government at about $1,000 an acre while the Webb award was less than $200 an acre; the Mobley tract next door, in another direction and with no road frontage

was purchased in 1956 at $680 an acre by PEPCO while a tract with limited road frontage brought $1,000 an acre; The Green tract next to the Webbs and 1½ miles from a road, access to which was through the Webb property, was bought by PEPCO at $550 an acre.

ii. Trial counsel failed in timely objections and exceptions to protect petitioners 157 F Sup 401 and 256 F 2nd 669). He not only failed to protect petitioners from the effects of reversible error when the trial judge refused the expert witnesses for the Webbs to introduce a completed sales contract to explain their appraisal and to give their theories for arriving at their evaluations but then destroyed before the jury the competence of the Webb expert appraisers and the value of the Hadley farm comparable by telling the judge, who had rebuked him for again trying to introduce the sales contract, by saying "My client asked me to do that. I did not think that it was necessary.—" (R pp 17, 18). —There was a complete lack of timely and public information or private advice as to the identity of competent counsel in eminent domain cases. Law schools, the College of Trial Lawyers, the various bar associations all uniformly declined to help locate such services. As negligence on the part of counsel emerged, lawyers of competence, at last located, declined to serve as counsel or as expert witnesses.

Judge Chesnut, by decree and order, denied petitioners' motions on May 1, 1959 (23 FRD 635; App B, infra, pp 20) Thereafter, petitioners filed a motion to amend this opinion and order which was denied on May 19, 1959. (R pp 47-55)

Appeal was made from this opinion and order to the U. S. Court of Appeals for the Fourth Circuit which order was affirmed on January 18, 1960. (App A, infra, pp 18)

REASONS FOR GRANTING THE WRIT

I

This case involves questions of both Constitutional and Statute Law.

The petitioners respectfully submit that their case has thus far been decided on their weaknesses, rather than strength, and that their failure to have been awarded a new trial offends against the spirit of Rule 60(b), (2), (3), and (6), FRCP, 28 USC 1254.

It has been said "A thing which is within the intention of the makers of a law is as much within the law as if it were within the letter of the law; and a thing that is within the letter of the law is not within the law unless it is within the intentions of the makers."

The Federal Rules for Civil and Criminal Procedure has a long history of orderly development with broad participation in its formulation by both bench and bar, national and state.

The climax of enactment occurred in hearings held on the bill before the House Judiciary Committee on March 1-4, 1938 and the resulting report to the House, Report 2743, June 13, 1938.

Attorney General Homer Cummings testified, among other things, as he appeared as the first witness (p 2):

.....

"But the courts do not exist for the lawyers; they do not exist for the judges. They exist for the litigants and litigants are entitled to the best possible procedure that human ingenuity can devise.

"The courts are established to administer justice, and you can not have justice if justice is constantly being

thwarted and turned aside by or delayed by a labyrinth of technical entanglements.

.....

"Manifestly, the whole profession—and when I speak of the whole profession I mean practically the whole profession—are concerned about the situation and are earnestly desirous of ridding the courts and profession itself of the charges of being the home of technicality.

.....

The report to the House on the bill said in part "It is confidently expected that the adoption of the new rules will materially reduce the uncertainty, delay, expense and the likelihood that cases may be decided on technical points of procedure which had no relation to the just determination of the controversy on its merits.—"

The petitioners hold that the judgment, from which they have sought relief, followed naturally from elements which prevented a fair trial. This case has been marked through pretrial, trial itself and in appeals thereafter by a lack of competent legal assistance; by actions adverse to the petitioners on the part of the trial judge, that in other trials has been termed by the courts "reversible error"; by deprivation of important testimony during the trial and of evidence which was not then available but is now; and the handling of the case for the respondent during trial in a manner constituting fraud upon the court.

The case was not decided upon its merits but upon weaknesses of the litigative process that the Federal Rules of Procedure, Rule 60(b)(6) "any other reason," was particularly designed and enacted to correct.

II

The trial court and the court of appeal failed to consider or comment upon, in any manner, the newly discov-

ered evidence that the petitioners believe would greatly influence the award in a new trial. This newly discovered evidence concerns the identity of the nine associates who, with C. Leo DeOrsey, bought Hadley farm next the Webbs for $270,000 or $700 an acre for 388 acres. The purchase was made before the U. S. took land from the Webb farm of 198 acres affecting some 39 acres by fee simple, easement or separation. The Hadley farm is immediately next to the Webb farm on Snouffer School Road.

The ten members of the syndicate are identified as being competent in business affairs of large importance, five of whom are competent to appear as expert witnesses in real estate matters for greater Washington. The investment of their own money at this price per acre would go far towards establishing this comparable as the key comparable. Their testimony would have much greater impact on a new jury than that of the expert appraisers. (Eminent Domain, Nichols, sec. 26.5312)

The newly discovered evidence, known at trial, was refused to the appellants as testimony by the syndicate, Custards, Inc. It becomes available through subpoena of company records following discovery of a straw sale recorded April 1, 1957 by Custards, Inc., to Catherine E. Wahler for $270,000. The straw sale was not discovered by petitioners until September, 1958. It wasn't discovered prior to trial because the research of land records was completed about March 20, 1957 for the scheduled trial date of March 27, 1957. Establishment of communication with A. Jasper Moore prior to trial date, successively postponed by Government to October 22, 1957, gave no clue concerning this sale which becomes the fulcrum to make the identity of syndicate members, the price of purchase as $270,000 in 1955 rather than $200,000 for a sale in 1956 that our expert witnesses were forced to use during the trial.

There is pertinence here in the finding in Taylor v. State (171 SW2 403, 405). "It is possible that the trial judge took the view that the evidence was not newly discovered, since defendant and counsel knew of it before and during the trial. But although not newly discovered evidence, in the usual sense of the term, its availability is newly discovered to which the same principle applies."

"Also pertinent is "In re McManus (72 NYS 409, 413) where the judge quotes from p 1020 3 Grah & W, New Trials. "If a case has gone against a party simply because a portion of his evidence, without a fault of his, has remained latent, so that the truth has been obscured, what is more evident than that the truth ought to be indicated by a second trial It would be wrong to permit, under such circumstances, the successful party to enjoy his advantage obtained not upon his own strength but on the weakness of his opponent, as to permit the latter to suffer without redress."

Also pertinent is quoted from p 414, Bangage v. Waterbury, 12 Hun, 534, "The law exacts from parties and their counsel in the trial of an action only reasonable diligence and when that has been observed, and notwithstanding its exercise, material evidence, not of a cumulative character, which would probably change the result, has eluded their discovery, and is subsequently discovered, a proper case is presented for a new trial."

The petitioners hold that they and their counsel and expert witnesses exercised reasonable diligence in searching the land records prior to the original trial date of March 27, 1957, and in establishing and maintaining communications with the syndicate that bought Hadley farm and retained ownership until 1960.

The failure of Webb counsel to obtain agreement with the Government for protection from any change in status

quo attending the various postponements of trial by Government becomes then a technicality that offends the spirit of 28 USC Section 1254. (ABA op 25) Tardiness in meeting scheduled trial dates is awarded in this instance by unearned advantage at attending increased costs and delay to petitioners.

The petitioners respectfully submit that the opinion of the trial judge that a price of $700 an acre for the Hadley farm purchase would mean little, as compared with the price of $500 used in the trial, fails to recognize the cause of rejection of Hadley farm as a comparable by the jury. By his own acts, in refusing to permit the use of the sales contract by the expert witnesses for the petitioners during the trial and to permit the witnesses to give theories underlying their valuations, he made their testimony valueless and unacceptable to the jury. The increased award by the jury of $4,000 merely brought the Government appraisal of the Webb property more nearly into line with the acreage value of the comparables used by the Government—about $200 an acre.

Such exclusion of data by the trial judge from the trial as well as the exclusion of the underlying theories for the appraisal arrived at by the Webb expert witnesses has in other eminant domain cases been determined to be reversible error. Reference is made to U. S. v. 5,139.5 acres of land etc., 200 F2nd 659, 662, and U. S. v. 25,406 acres of land, 172 F2nd 990,993 and 69 S Ct 1496 Certiorari denied.

IV

Although the trial court endeavored during the hearing leading to his opinion (App B, infra, pp 20), and although the recording date for the deed of sale by Custards, Inc., was established by petitioners and respondent alike as

April 1, 1957 (R pp. 42 and 46), the trial judge states that it was March 1, 1957. If it had really been recorded at that earlier date, the petitioners would have had no ground for claiming reasonable diligence in the search of land records prior to the preparation for scheduled trial on March 27, 1957. Instead, the petitioners hold that the search of land records prior to the scheduled date of trial on March 27, 1957, and the establishment and the maintenance of contact and communication with Custards, Inc., with no indication of such straw sale prior to September, 1958, establishes this date as the tolling date for the availability of the newly discovered evidence and the resultant filing of the motion by petitioners for relief from final judgment on the basis of newly discovered evidence on October 10, 1958 as being both prompt and timely action under Rule 60(b)(2).

V

The petitioners submit that the two incidents termed fraud on the part of respondent are fraud upon the court for which no time limit for filing is specifically specified by Rule 60(b)(3).

The petitioners argue that the testimony of Beasely and its use by Government counsel was fraudulent. Beasely had testified that the Webb land was worth only $200 an acre as agricultural land while he had (unknown to the petitioners) appraised land for the Government next to the Webbs at $1,000 an acre. This disparity of appraisals by the same witness was known to the Government counsel yet the low figure for the Webb property was used vigorously.

Petitioners argue that the repeated labelling of Snouffer School Road as a mere "dirt road" by Government counsel in closing argument was intentional and known

to be short of the truth and therefore fraudulent. It was known that Snouffer School Road was to be permanently improved, as it indeed is (R pp. 54 and 55). By distortion or suppression of this information, he performed fraud upon the court.

Petitioners argue that the fraud of the first act was unknown until too late to act under Rule 59(b).

They argue that failure on the part of Webb counsel to establish the status of Snouffer School Road in pre-trial and during the trial was a part of his failure to act with professional competence. Also, the failure of appeals counsel to use this matter in the appeal perhaps followed from "professional courtesy" to the trial lawyer and thus protect him from a charge of negligence. They thereby caused potential harm to the cause of their clients. Rule 60(b) was designed to protect a litigant under such unpredictable circumstances.

Reference is made to Dausuel et al v. Dausuel (195 F 2nd 774-775) for precedence in the candid use of testimony before the court. Here, reversal of a judgment in a district court was awarded by the U. S. Court of Appeals for the District of Columbia which found that a court may at any time set aside a judgment for after discovered fraud upon the court, 60(b)(3), and that if, as the appellant in that case alleges the appellee testified falsely during the divorce proceedings, concerning the amounts she earned, she committed fraud upon the court.

In this instance, the use of the valuation of the Webb property, in the light of a much greater valuation for the adjoining Hadley farm property by the same witness, Beasely, and attested to as being fair by Government counsel, was as much fraud upon the court as that in Dausuel v. Dausuel.

Also, the knowing and repeated labelling of Snouffer School Road by Government counsel as a mere dirt road was short of the truth done to harm the petitioners and as much fraud upon the court as misrepresentation in Dausuel v. Dausuel.

See also 23 Am Jur, Fraud & Deceit, sec 78 pp 856; 10 RCL Evidence s 31.

The trial court erred, as did the court of appeals, in failing to recognize that Rule 60(b)(6) "any other reason," justified relief from the operation of the judgment. The judgment qualified as being monstrous. It was an island in which the jury made an award of $200 an acre as just compensation, surrounded by similar or much less desirable land for which competent business men had previously paid $700 an acre for 388 acres or a public utility had paid from $1,000 an acre to $550 for smaller tracts as rights of way.

The legal system deprived the petitioners of timely knowledge of counsel competent in eminent domain law in a Federal district court. County pre-eminence as a lawyer gave the petitioners counsel that demonstrated, in trial preparation, in pretrial and during trial a lack of basic understanding and skill in application of the law attended by paralyzing fear in a trial court that appears not uncommon to others in the knowledge of the bar and bench of this state and community as pertaining to that particular trial court.

In specific illustration of the lack of legal knowledge and skill of trial counsel attended by fear was the interplay between the bench and trial lawyer. Here, trial counsel was reminded by petitioners that the last chance for the expert witnesses to introduce a completed sales contract as evidence of the intent of the buyers and the commitment of the sellers to assist in the development of Had-

ley farm as a GI housing project was at hand. Rebuked by Judge Chesnut for trying a second time to introduce this hearsay document, trial counsel blamed petitioners for an act which had been commonly agreed trial strategy. In addition, he killed the value of the document by calling it of no value and giving to it informational value already introduced into the trial which the sales contract did not contain and for which it had no value. Why had he not established this at pre-trial as admissible evidence save as being completely unversed in such matters and in which no guidance was offered or, if offered, accepted?

Finally, why should appeals counsel, one of whom told the trial judge that he had appeared as a member of the staff of the Attorney General of the United States in all Federal courts of appeal and in all district courts, save that of Maryland, restrict the appeal to only those matters in which the trial lawyer could be held blameless and in matters which had never before been reversed by a Federal appelate court? (Barron and Holtzoff) Where it is common knowledge that expert opinion is held to be worthless without the theory underlying the opinion, his action can best be described as "professional courtesy" to a brother lawyer. Close working relationship is subsequently evidenced by common action in matters in two jurisdictions pertaining to litigation on fees claimed from the petitioners.

Reference, on the availability of Rule 60(b)(6) "any other reason" to these, as well as all other preceding matters, is made to U. S. v. Karhalias (205 F2nd 333). In the opinion, Circuit Judge L. Hand said "Subsection (6), on the other hand, is itself for equitable relief, and, if confined to situations not covered by the first three subsections, would be extremely meager, even assuming that we could find any scope for it at all. Moreover, if we could, it would be a strange purpose to ascribe to the Rule to say that, although subsection (6) was no more than a kind of

receptacle for vestigial equities, it should be without any time limit, while the other and the usual equitable grounds for relief were narrowly limited. We do believe that this was its purpose. We think it was meant to provide for situations of extreme hardship, not only those, if there be any, that subsections (1), (2) and (3) do not cover, but those that they do. In short, to put it quite baldly—we read the subsection as giving the court a discretionary power over the limitations imposed by the Rule itself on subsections (1), (2) and (3)."

CONCLUSION

For the reasons given, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7999.

JOHN C. WEBB and HELEN H. WEBB,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
W. CALVIN CHESNUT, DISTRICT JUDGE

(Argued January 13, 1960. Decided January 18, 1960.)

Before SOBELOFF, HAYNSWORTH and BOREMAN, Circuit Judges.

John C. Webb, Pro Se, and Hugh Nugent, Attorney, Department of Justice, (Perry W. Morton, Assistant Attorney General, Leon H. A. Pierson, United States Attorney, and S. Billingsley Hill, Attorney, Department of Justice, on brief) for Appellee.

APPENDIX B

FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA v. 72.71 ACRES OF LAND, MORE OR LESS, SITUATE IN MONTGOMERY COUNTY, STATE OF MARYLAND AND JOHN C. WEBB, et al	CIVIL ACTION NO. 8628

Filed May 1, 1959

Chestnut, District Judge.

The matter now before the Court in the above case arises upon a petition filed by Capt. and Mrs. Webb (landowners) for "relief from judgment" based on section 60(b) of the Federal Rules of Civil Procedure. This section provides in part that a litigant may file a petition for relief from judgment against him based on "newly discovered evidence" or "fraud" if filed *within a reasonable time*, and if filed not more than one year after the judgment was entered. In this case the petition referred to was filed very shortly before the expiration of the year but is opposed by the United States on several grounds, one of which is that it was not filed within a reasonable time. I will first consider this point.

It is necessary to bear in mind the nature of the case as a whole. It is a federal land condemnation case. On December 5, 1955 the United States filed its complaint to condemn for military purposes a nike site on the property of John C. and Helen H. Webb in Montgomery County, Maryland. What was taken consisted of 13 acres in fee simple and an easement in 22 acres which left the latter acreage usable only for agricultural purposes. These 35 acres were

a small part of a farm of 198 acres belonging to the landowners. On December 5, 1955 in accordance with due procedure the United States deposited in the Registry of this Court the sum of $8,600 as estimated just compensation for the taking of the property. On January 26, 1956 Capt. Webb withdrew the whole of the deposit of $8,600 by consent, leaving open for determination the amount of just compensation.

On February 21, 1956 the landowners appeared in the case by their attorney, James R. Miller. On May 11, 1956 Mr. Miller withdrew his appearance and on October 29, 1956 John E. Oxley, an attorney of Montgomery County, entered his appearance for the property owners.

The case came on for trial on October 22, 1957 when the jury was impanelled, brief opening statements by counsel for the parties were made and the jury was instructed to visit the property in the custody of the Marshal and with instructions given by the Court that when viewing the property the parties would be represented respectively by some one on the ground who would have the opportunity to point out the boundary lines of the property condemned and its relation to the whole property of the Webbs, and also generally to see nearby surrounding properties. After the jury had inspected the property the parties submitted evidence with respect to valuations to determine just compensation. The Government was represented by two appraisers and the property owners were represented by two appraisers. Some part of the evidence given by all the appraisers was based on sales not too remote in time or place, and thought by the witnesses respectively to be "comparable sales." The valuation of the property by the Government appraisers ranged from $8,600 to about 10,000, approximately; but the valuation of the appraisers for the property owners varied from $41,000 to $43,000, approximately. One of the appraisers for the property owners

relied on what he considered as a comparable sale, the sale of the Hadley farm of about 400 acres for a sum to represent a valuation of about $500 an acre, the farm referred to adjoining that of the Webb farm.

The trial lasted three days in all. After argument of counsel the jury was instructed as to the law applicable to the case and the jury returned a written inquisition on October 24, 1957 fixing the just compensation payable to the Webbs, at $14,000.

On November 1, 1957 Mr. Oxley withdrew his appearance for the property owners and Messrs. Custer and Seegmiller, who had not previously been connected with the case but who were attorneys in Montgomery County, entered their appearance for the Webbs and filed a motion for a new trial, assigning the reason that the verdict was against the evidence, and irregularities in the trial; and on the same date filed another motion to extend the time for assigning further grounds in support of the motion for a new trial until November 25, 1957, which was granted by the Court, and on November 25, 1957 the new motion was filed.

This motion for a new trial came on to be heard and after hearing counsel was overruled by the Court in a written opinion filed December 23, 1957 (157 F. Supp. 401, D.C. Md. 1957; aff'd. 256 F. 2d 669, C.A. 4th Cir.).

Some time after the affirmance by the Court of Appeals it appears that the new counsel retired or were released by the property owners, and on October 10, 1958, two weeks before the expiration of the year from the date of the judgment, Capt. Webb filed the motion for relief from judgment prepared by himself without the aid of counsel. This motion could not appropriately be immediately heard as the property owners were petitioning for the issuance of certiorari by the Supreme Court to review the order of the Court of

Appeals dated June 30, 1958 affirming the judgment of this court in overruling the motion for a new trial. The petition for certiorari was denied on January 12, 1959 (358 U.S. 931) and thereafter Capt. Webb filed a petition in the Court of Appeals for leave to this Court to consider his motion for re-hearing or a new trial and such permission was given by the Court of Appeals in a per curiam order dated March 11, 1959 (.....).

While the expressions in the motion of the grounds for a new trial may seem to need clarification, I understand as aided by the oral hearing, that what Capt. Webb wishes to present as a basis for a new trial and what he seems to describe as newly discovered evidence, is that he thinks if a new trial is granted he will be able to establish that the real consideration for the sale referred to above as a "comparable sale" was really about $700 an acre instead of $500 an acre as advanced by his appraisers.

In view of the nature and perspective of the case as a whole, it is my opinion that the present motion has not been filed within a reasonable time. The valuation of the property for the determination of just compensation had to be made as of December 5, 1955. The property owners were promptly apprised of the taking and appeared by counsel and had nearly two years to prepare their case for the jury. The main question in the whole matter always has been what was just compensation. The property owners contend for a much larger valuation than the jury's award. They had not only nearly two years to prepare their case before the trial but after it they had nearly another year before filing the present motion. In the meantime on November 10, 1958 the property owners have withdrawn the balance of the $14,000, to wit $6,048.

Rule 60(b) headed "Relief from Judgment" seems to be at least an unusual application, if properly applicable at all to the situation we have here. There is no judgment

against the Webbs but only in their favor, the benefits of which they have accepted although possibly without prejudice. Their objective seems to be a new trial of the case in the hope that another jury will grant them a larger sum for just compensation. But if another jury should award a smaller sum, the property owners would legally be required to refund the difference to the Government. And at the present time they make no offer or tender of return of the sum or any part thereof which has already been paid to them.

There are even more important objections to granting the motion than its lack of timeliness. There are some well settled rules with respect to granting a motion for a new trial on the ground of newly discovered evidence. The new evidence referred to must be something which was unknown at or before the trial, must have been something which could not have been discovered by reasonable diligence and must also be something which in its nature would indicate that a new trial would be more favorable to the movant, and must be material and not merely cumulative. Moore, Federal Practice, Vol. 7, 2d. Ed. p. 243; United States v. Frankfeld, (D.C. Md. 1953) 111 F. Supp. 919 at 922, aff'd 207 F. 2d 413 (C.A. 4th Cir. 1953).

The new evidence here relied upon and as above referred to, is that one of the alleged "comparable sales" used by one of the appraisers for the property owners at the trial as a basis for his valuation was at the rate of $500 an acre, while it is now said the rate was really $700 an acre. But when what is said in the motion is closely read, it appears that this difference was in fact known to the property owners even before the first trial. What is now said is that while the property owners knew the true valuation was $700 an acre, they did not advance that at the trial because as they say, they felt unable to prove it because the parties to the sale were unwilling to then state the real price in

that the purchaser was only a "straw man" and it was not until later that the *real purchaser was revealed* by a subsequent deed reflecting the true and larger purchase price. More particularly it is now said by Capt. Webb that the first recorded sale of the Hadley farm (used as a comparable sale) was in March 1956 at the apparent purchase price per acre of $500, but that on March 1, 1957 the same property was embraced in a recorded deed showing the consideration to be at the rate of $700 an acre. As the later deed was recorded it could, of course, have been discovered by diligence before the trial. It is ordinarily the function of a real estate appraiser to make an examination of the Land Records to discover so-called "comparable sales." In this instance the appraiser evidently did make such an examination and did learn of the first sale but apparently overlooked the second sale involving the same property.

Nor do I think the difference between the $500 and $700 would have been material and would likely have produced a more favorable valuation for the property owners if it had been advanced at the trial. The sale of the Hadley farm referred to as a comparable sale was not a dominant feature of the evidence as to the value of the property taken. The four appraisers used different sales as comparables. The Hadley farm was only one of such sales, eight or more in number. The land taken by the Government constituted in all 35 acres. While the valuation by the jury was $14,000 or at the rate of less than $400 an acre even if all 35 acres had been taken in fee, this was materially less than the $500 an acre for the comparable sales used by the property owners' appraisers at the trial. It is clearly inferable that the jury did not accept the Hadley farm sale as a "comparable sale," and there was evidence in the case to that effect. Furthermore, as has previously been pointed out in the transcribed charge to the jury in the case and in the written opinion overruling the motion for a new trial, the real contest as to valuation was between

the contention of the property owners that the valuation should be on the basis of the value of the property for development purposes, and the contention of the Government that the basis for valuation was that of agricultural property. The jury evidently found against the property owners as to the proper basis.

For all these reasons I conclude that the motion for a new trial based on newly discovered evidence should be and it is hereby *overruled*.

On April 7, 1959 Capt. Webb filed an additional motion called a motion to amend the former motion filed October 10, 1958. This seccond motion was filed long after the expiration of a year from the date of the judgment and therefore not within the time limit for filing a motion on the ground of newly discovered evidence or fraud. Amendments of pleadings before the trial of a case are liberally allowed but after the review of this case as heretofore made, I do not think the present motion should be allowed as an amendment at this late date.

This motion is captioned as a motion to relieve the property owners from judgment on the ground of both newly discovered evidence and "fraud." With it is filed an affidavit of Capt. Webb. On reading it, it will be found that what is now referred to as newly discovered evidence is substantially the same as the earlier motion filed on October 10, 1958. It is therefore subject to the same consideration that I have found are fatal to the granting of a motion on the basis of newly discovered evidence. The second part of the affidavit sets out certain matters occurring at the trial itself in October 1957 which are advanced as warranting the charge of fraud against the Assistant United States Attorney in the trial of the case. What is now said in this respect does not, in my opinion, constitute anything like fraud within the meaning of rule 60(b). At the most it might be referred to as a further specification of misconduct

of the Assistant United States Attorney, in the view of the affiant, and as such it is certainly not timely but very belated. It will be remembered that the property owners by their then counsel obtained an order extending the time for filing further grounds for a new trial after obtaining a transcript of the trial of the case from the court reporter; and thereafter added to their motion for a new trial the special assignment of alleged misconduct of the Assistant United States Attorney in the trial. This motion was overruled after hearing and the ground of alleged misconduct was litigated on appeal and overruled by the Court of Appeals. What is now further said in this connection is in substance that the Assistant United States Attorney knew or should have known that the road bordering the property taken by the Government, then a gravel road only, was intended to be widened and improved by the public authority and that during the trial of the case a paper which the affiant thought was of importance to the case, had been left by him or his attorneys in the court room during recess and was not found by them after recess.

As to the condition of the road, which was open for discussion on appeal, it should be noted that the roadway referred to was in fact a gravel road in December 1955 when the land was taken and, so far as I recall from the evidence in the case or from anything now said by the property owners, is still a gravel road. But however that may be, the valuation had to be with respect to the conditions existing in December 1955 when the property was taken by the Government.

The present motion seems to make the point that under section 60(b) the motion for relief from judgment may be filed even after the expiration of a year "for any other reason justifying relief." Assuming, without deciding, that this phrase is sufficient to allow re-opening of a judgment for other than newly discovered evidence or fraud, it would

at least seem to be limited to very unusual situations of an extraordinary nature in order to avoid manifest injustice. Moore, Fed. Prac. Vol. 7, 2d Ed. p. 297, et seq; Barron & Holtzoff, Fed. Prac. & Proc. Vol. 3 s. 1329, p. 417, et seq: I do not find that anything in these two motions filed at this late date could fairly be included in such a category.

For all these reasons both the pending motions are hereby *denied*. The Clerk is requested to send a copy of this opinion and order to the property owners.

W. CALVIN CHESNUT
U. S. District Judge

True Copy
Test:
WILFRED W. BUTSCHKY
Clerk
By EARL L. GRAHAM
Deputy Clerk

Note 1: Section 60(b) reads as follows:

"Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated,

or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, for the reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., s. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946; Dec. 29, 1948, eff. Oct. 20, 1949."

APPENDIX C

INQUISITION AND JUDGMENT

Oct. 24 Inquisition assessing damages as to Tracts Nos. A-100-1, A-100-2, A-100-2, A-100-E-1, A-100-E 3, A 100-1, A-100-2, A-100-2, A-100-E-1, A-100-E-3, A-100-E-4 and A-100-E-5 in the total sum of Fourteen Thousand Dollars ($14,000.00) and awarding same to John C. Webb and Helen H. Webb, tenants by entirety, filed.

" " Judgment on Inquisition assessing damages as to Tracts Nos. A-100-1, A-100-2, A-100-E-1, A-100-E-3, A-100-E-4 and A-100-E-5 in the total sum of Fourteen Thousand Dollars ($14,000.00) and awarding same to John C. Webb and Helen H. Webb, tenants by entirety, with interest at the rate of six percent until paid, from the dates of the taking of said Tracts, on the difference between the amount deposited by the Government as the estimated award for the taking of said Tracts, and the amount of the damages awarded by the Inquisition.